In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 727

FRANK E. EALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A six count indictment, based on two transactions in heroin on December 16, 1965, and January 13, 1966, was returned against petitioner in the United States District Court for the Western District of Washington. Counts 1 and 2 charged concealing and selling illegally imported heroin, in violation of 21 U.S.C. 174; counts 3 and 4 selling heroin from an unstamped container, in violation of 26 U.S.C. 4704(a); and counts 5 and 6 dispensing narcotics without a written order form, in violation of 26 U.S.C. 4705(a) (I R. 1–3).

A deputy sheriff named Gordon, hired as an undercover agent, made the purchases with government funds. On December 16, 1965, he paid petitioner $350

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for narcotics which, in accordance with petitioner's directions, he found in a tree outside the motel where they met. The narcotics were in a rubber prophylactic which was turned over to narcotic agents (II R. 9–11, 34–40, 96). On January 6, 1966, petitioner measured out 66.9 grams of heroin and placed them in a container which he handed to Gordon in exchange for $1,050 (II R. 48–51, 198). The narcotics were later given to Agent Ferro (II R. 25, 52–53).

Sheriff Gordon testified further that on neither occasion was he registered with anyone to purchase narcotics; nor did he present to petitioner any written request for the heroin on a form supplied by the Treasury Department (II R. 56–58). Agent Ferro testified that there were no tax stamps on either container containing the narcotics (II R. 14, 25). After the trial court ascertained that the agent was not familiar with the type of Treasury tax stamp customarily affixed to narcotics, the agent's testimony concerning the absence of such tax stamps on the two containers was ordered stricken (II R. 25–27).

At the close of the government's evidence, petitioner moved for a judgment of acquittal on all six counts. The court expressed doubts as to the sufficiency of the evidence on the stamped package counts (3 and 4) but reserved decision until after verdict. (II R. 104–107). At the close of petitioner's case, the motion was not renewed, although after the jury had retired petitioner did object to the submission of counts 3 and 4 to the jury (II R. 143–144). A verdict of guilty was returned against petitioner on all six counts. The trial court, at

the time of sentencing, directed a judgment of acquittal on counts 3 and 4 (I R. 44–45, 54).

Petitioner was sentenced to ten years' imprisonment on counts 1 and 2 and to five years on counts 5 and 6, all sentences to run concurrently. The court of appeals affirmed *per curiam* (Pet. App. I).

1. The ultimate acquittal on counts 3 and 4 did not require an acquittal on the other counts. Although the offenses are closely related and arise out of the same two transactions, the offenses constitute three separate violations of three statutes, each containing different elements and requiring different proofs. See *Harris* v. *United States,* 359 U.S. 19, 23–24; *Gore* v. *United States,* 357 U.S. 386. The acquittal on counts 3 and 4 was based on the judge's view that there was insufficient proof of the lack of stamps on the package. That in no way affected the proof on the other counts.

2. Petitioner was not prejudiced by the judge's reservation of decision on counts 3 and 4 until after verdict. The procedure is specifically authorized by Rule 29(b). The rule does not preclude the court, any more than the jury, from treating each count of the indictment separately. Petitioner's assertion that the offenses involved are so indistinguishable as to require the jury to find him either guilty or innocent on all three is, for the reasons stated above, without merit. In its charge to the jury, the trial court set forth the necessary elements to be proved as to each offense and the distinct presumptions on which the jury could rely in their deliberations (II R. 129–134). That the judge

disagreed with the jury as to the proof of the absence of stamps does not show that the jury was confused.

3. Under 26 U.S.C. 4705(a), it is an offense to sell narcotics except pursuant to a written order on a blank supplied by the Secretary of Treasury or his delegate. There is no merit in petitioner's challenge to the sufficiency of the evidence on counts 5 and 6 laid under that statute. Gordon testified to the purchases from petitioner; that at no time did he deliver to petitioner a written form from the Treasury Department; and that he was not registered with anyone to purchase narcotics (II R. 56–58). All elements were proved.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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